Furthermore, it has already been held, in a case involving the North Carolina Railroad Commission, that proceedings legislative in nature are not proceedings in a court within the meaning of Rev. Stat. 720, no matter what may be the general or dominant character of the body. *Southern Ry. Co. v. Greensboro Ice & Coal Co.*, 134 Fed. Rep. 82, affirmed, 202 U. S. 543. Had this been a proceeding to enforce an order of the commission already promulgated, it could not have been interfered with by injunction, but "litigation cannot arise until the moment of legislation is past." See *Southern Railway Co. v. Com.*, 107 Va. 771; 60 S. E. 70.

MENTAL ANGUISH AS DAMAGE IN DELAYED TELEGRAMS.

There have been many conflicts in decisions between the different state courts but it is doubtful whether there is any subject upon which the cases are so positively opposed to each other as that mentioned above.

The Supreme Court of Tennessee in *Western Union Telegraph Co. v. Potts*, 113 S. W. 789, is the most recent case to hold that mental anguish is an element of damage recoverable for delay in delivering a telegram announcing a death. When Shearn and Redfield published their work on the *Law of Negligence*, they expressed the opinion that delay in the announcement of a death may often be productive of an injury to feelings which cannot easily be estimated in money, but for which a jury should be at liberty to award fair damages. No authorities were cited to support the proposition and it passed unnoticed until the case of *So Relle v. W. U. Telegraph Co.*, 55 Tex. 308 (1881). In this case the court adopted the suggestion of Shearn and Redfield, and for the first time in the history of the common law, damages were awarded for mental suffering caused by the delay of a telegram. The opinion said that the natural consequence of a failure to transmit and deliver a so-called death message was to produce the keenest sense of grief and inflict upon the mind the sorest sorrow for which justice required the balm of damages. Hitherto, no jurisdiction allowed a recovery for injury to feelings except in a few isolated breach of promise suits, or in cases where the injury was wilful and malicious. But this case has been the precursor of a number of others holding the same way and may be considered responsible for the great division of opinion now existing. At the time the decision was rendered it is doubtful

whether the court realized the great influence it would have upon many similar cases subsequently arising not only in Texas, but in other states. Other courts were not long in seizing upon the doctrine expressed, and when once they adopted it, except in the case of Indiana, have tenaciously retained it. In *Cowan v. The Western Union Telegraph Co.*, 122 Ia. 379, it was strongly urged that the case of *Mentzer v. Telegraph Co.*, 93 Ia. 752, which followed the Texas decision, be overruled because the authority mainly relied upon in the Mentzer case (*Reese v. Western Union Telegraph Co.*, 123 Ind. 294) had since been overruled by the Indiana courts, but the judges expressed themselves as well satisfied with the principles stated in that case, and hence we find the law of Iowa to still be the same. While the doctrine is of comparatively recent origin it has steadily gained strength, although many judges continually characterize it as being contrary to the common law. But it possesses much inherent merit and after it was first announced rapidly obtained favor with a number of the courts and in some instances with legislatures. The legislature of South Carolina has provided by statute for the recovery of such damages—23 Stat 748, Code 1902, Vol. I, Sect. 2223. This act was held to be constitutional in *Simmons v. Telegraph Co.*, 63 S. C. 425. Prior to its passage, however, South Carolina had adhered to the old common law rule. *Lewis v. Western Union Telegraph Co.*, 57 S. C. 325. The Louisiana Civil Code, Sect. 1934, says where the contract has for its object the gratification of some intellectual enjoyment whether in religion, morality or taste, or some convenience or other legal gratification, although these are not appreciated in money by the parties, yet damages are due for their breach. In *Graham v. Western Union Telegraph Co.*, 109 La. 1070, it is said that in view of this it is difficult to see why a breach of contract which leads to the infliction of positive mental suffering should remain without a legal remedy. While all the courts agree that the legislature may pass such an act, it is remarkable to note the number of cases holding there can be no recovery at common law because the damages are too speculative, and therefore impossible of computation, and yet at the same time intimate that a legislative enactment would afford relief. If it is impossible to determine damages in the absence of a statute, it is questionable whether an act which merely gives a right of action will remedy such a fault.

Until recently the tendency of the Alabama courts was to admit

the rule in its entirety, but with the case of *Western Union Telegraph Co. v. Blocker,* 138 Ala. 484 (1903), it was subjected to the modification that damages will not be allowed for mental anguish unless shown to be accompanied by other damage resulting from the wrong. Nebraska and Nevada, however, have adopted the rule as stated in *So Relle v. Telegraph Co.* (*supra*); *Western Union Telegraph Co. v. Church,* 90 N. W. 878; *Barnes v. Rd.,* 76 Pac. 931.

Despite the number of courts permitting a recovery, upon examining the cases it is apparent that the weight of authority is opposed to this doctrine. But Mr. Sutherland in his treatise on *Damages* (Vol. III, Sect. 980), is of the opinion that the weight of authority favors it. This work was published in 1893, and as the law has undergone many changes since then, it is probable that at the present time the author's opinion would be changed. Some severe strictures have been passed upon the So Relle case by those who incline toward the opposite view. In *Chapman v. Telegraph Co.,* 88 Ga. 763, it is said that the case adopts as law a bare suggestion made by text writers, and that the cases referred to in the opinion were actions for physical injuries of which mental anguish forms an inseparable component. A remark to the same effect is also made in *International Ocean Tel. Co. v. Sanders,* 32 Fla. 434. The justice of the doctrine seems to be fully recognized by the courts holding the negative view, but they are unwilling to part from the idea that there could be no such recovery at common law and that while courts may extend the application of common law rules to the new conditions of advancing civilization, they may not create a new principle unknown to the common law nor abrogate a known one. *Western Union Tel. Co. v. Ferguson,* 157 Ind. 64, overruling *Reese v. Telegraph Co.* 123 Ind. 294. New York follows the majority, and holds that an injury to feelings is not in a judicial sense a proximate consequence of the negligent act. *Curtin v. Co.,* 42 N. Y. Supp. 1109. Arkansas, Mississippi and Missouri all unite in repudiating the Texas rule. See *Peary v. Telegraph Co.,* 64 Ark. 538; *Western Union Telegraph Co. v. Rogers,* 68 Miss. 748; *Connell v. W. U. T. Co.,* 116 Mo. 34. The conflict is sharp and well-defined, for there are no fine distinctions attempted to be drawn in the opinions on either side. The arguments and principles of law applicable are comparatively few and simple, but yet there is almost an even balance of opinion upon each one. The

fundamental objection is that it is impossible to estimate the damages in this class of cases because the injury is of too vague a character to have a pecuniary value. But on the other hand it is claimed that it is as possible to estimate the damages as it is in actions where the mental suffering is incidental to a bodily injury. While there are many strong opinions to be advanced on both sides of the question, it is doubtful whether the doctrine will ever obtain a permanent foothold in the majority of states for there are so many difficulties surrounding its practical application that it will probably never have the support of the weight of authority. It is worthy of notice, however, that those courts enforcing the rule deny that there are any difficulties in the way of its successful application. There are no English cases countenancing such law, for in England the question has evidently been considered not even debatable. It will be interesting to note whether in the future other courts will support it, for it needs but very little authority to shift the weight in its favor.